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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-383

SHERRELL NUNNELLEY, et al., etc.
BOARD OF EDUCATION OF LOUISVILLE,
KY., et al. - - - - - - - - Petitioners

versus

CHARLES H. MILLER, et al., etc.
BOARD OF ALDERMEN OF LOUISVILLE,
KY., et al. - - - - - - - - Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

RESPONDENTS' BRIEF IN OPPOSITION

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ARGUMENT

This is a controversy turning on a question of Kentucky law which does not involve any issue arising under the Federal Constitution. The Board of Education of Louisville, Kentucky, Petitioner herein, a state agency created by statute, challenges the authority of its creator to impose limitations upon those powers which it had been granted.

The enactment by the Kentucky Legislature of Kentucky Revised Statute 160.470(2) (Pet. 17a and 18a),

prohibits this Petitioner with certain exclusions from submitting a budget which would require more revenue from local ad valorem taxes than would be produced by application of the preceding year's rate to the preceding year's assessment.

The limitation contained in this section of the statute is the crux of this action. The effect of this legislation, contained in KRS 160.470(2) limits the demands the Board of Education can make upon the tax levying authority.

Section 183 of the Constitution of the Commonwealth of Kentucky provides that "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state."

How the General Assembly shall best accomplish this objective has been declared by our Kentucky Court of Appeals to be purely a matter of legislative discretion. *Elliott, et al.* v. *Garner, et al.,* 140 Ky. 157, 130 S. W. 997 (1910).

Consistent with the mandate of the people of the Commonwealth of Kentucky, as contained in the Constitution, the legislature created boards of education and granted to them general control and management of the public schools. KRS 160.160, 160.290 (Pet. 11a, 15a).

In Kentucky Revised Statutes 160.470(1) (Pet. 17a) the legislature empowered the board of education, among other things, to prepare a general school budget, showing the amount of money needed to be raised by local taxation, including the rate of levy necessary to

raise such an amount for the operation of the schools in its district during the succeeding fiscal year. By Subsection (2) thereof, the legislature has limited the power of the board of education, by restricting the amount of revenue it can demand to be raised by local taxation.

It is significant that KRS 157.440 (Pet. 9a), provides a method to overcome the limitations imposed upon the Petitioners by KRS 160.470(2), by submitting the matter of increased taxes to the qualified voters of the district. In addition, our Kentucky Court of Appeals has held in *Holmes* v. *Walden,* Ky., 394 S. W. 2d 458 (1965), that the limitation imposed upon the board of education may be exceeded when a higher rate is necessary for the district school program to participate in the minimum foundation program as provided for in KRS 158.380.

The whole subject of common school education is confided to the judgment of the General Assembly by the Constitution, and as stated by our Kentucky Court of Appeals in the case of *Prowse, et al.* v. *Board of Education of Christian County,* 134 Ky. 365, 120 S. W. 307, 309 (1909):

> "It [the General Assembly] may create such agencies as it deems proper to carry out the provisions of the Constitution. The General Assembly comes fresh from the people. After a short session of 60 days, it returns to the people, and if any measures conceived by it to provide an efficient system of common schools throughout the state, shall not prove satisfactory to the people, they have ample remedy in their own hands to correct the evils."

The state has a right to govern through such agencies as it may choose. *Duke, et al.* v. *Boyd County,* 255 Ky. 112, 7 S. W. 2d 839 (1928). The state, in this instance, created the board of education to accomplish its objective in providing for an efficient system of common schools throughout the state. The petitioning Board of Education herein, being an agency created by statute and invested only with powers expressly conferred upon it, cannot claim powers granted to it by statute and only by statute, and attack as unconstitutional the limitations imposed upon that power by the same statute.

The State, and its legislative body conforming its action to the State Constitution, may at its pleasure modify or withdraw all of the powers of the Petitioners. As a board or agency created by the state to enable it to perform certain governmental duties, the Petitioners have no standing to attack the statute, which is only a limitation of its powers enacted and granted to it by the state which created it.

The policy, system, justice or fairness of the statute under consideration are questions for the consideration of those to whom the state has entrusted its legislative power. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it. *Hunter* v. *Pittsburgh,* 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151 (1907); *Williams* v. *Mayor and City Council,* 289 U. S. 36, 53 S. Ct. 431, 77 L. Ed. 1015 (1933); *Risty* v. *Chicago, R. I. & P. Ry.,* 270 U. S. 378, 46 S. Ct. 236, 70 L. Ed. 641 (1926);

City of Trenton v. *New Jersey*, 262 U. S. 182, 43 S. Ct. 564, 67 L. Ed. 937 (1923).

Kentucky has provided and determined the powers, methods and procedures which it thought proper and necessary to provide an efficient system of schools and the safeguards which it thought necessary to protect against abuse.

CONCLUSION

It is difficult to conceive how an attack by a state agency upon its creator, challenging its authority to limit its powers, can come within the ambit of the Fourteenth Amendment of the Constitution. Accordingly, it is respectfully submitted that a petition for writ of certiorari be denied.

Respectfully submitted,

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